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In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Questions presented	2
Statement	3
The questions are substantial	5
Conclusion	8
Appendix	9

CITATIONS

Cases:

American Trucking Assns. v. *United States*, 344 U. S. 298 — 2

Chicago, Milwaukee, St. Paul and Pacific R. R. Co. v. *State of Illinois*, No. 307, Oct. Term, 1956 — 1

Florida v. *United States*, 282 U. S. 194 — 5–6

Frozen Food Express v. *United States*, 351 U. S. 40 — 2

Illinois v. *United States*, 101 F. Supp. 36, affirmed, 342 U. S. 930, rehearing denied, 343 U. S. 911 — 7

King v. *United States*, 344 U. S. 254 — 2

North Carolina v. *United States*, 128 F. Supp. 718, affirmed, 350 U. S. 805 — 6, 7

Statute:

Interstate Commerce Act, 49 U. S. C. 13 (3) (4) — 4, 5, 6, 9

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court is not yet reported, and is set forth as Appendix A of the appellant's jurisdictional statement in *Chicago, Milwaukee, St. Paul and Pacific R. R. Co.* v. *State of Illinois*, No. 307, this Term. The judgment of the district court is set forth as Appendix B of the jurisdictional statement. The report of the Interstate Commerce Commission is reported in 297 I. C. C. 353. This report and the two resulting orders of the Commission dated November 21, 1955, and March 2, 1956, are set forth respectively as Appendix C, Appendix D, and Appendix E of the jurisdictional statement. The foregoing Appendices are incorporated herein by reference.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 to set aside and enjoin enforcement of an order of the Commission. The judgment of the district court was entered on June 14, 1956, and the United States filed its notice of appeal in the district court on August 13, 1956. The jurisdiction of this Court to review the district court's judgment by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by the following cases: *King* v. *United States*, 344 U. S. 254; *American Trucking Assns.* v. *United States*, 344 U. S. 298; *Frozen Food Express* v. *United States*, 351 U. S. 40.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 9–10.

QUESTIONS PRESENTED

(1) Whether the district court erred in holding that the Interstate Commerce Commission, in exercising the authority given it by Section 13 (4) of the Interstate Commerce Act to increase intrastate fares in order to remove an unjust discrimination against interstate commerce, may consider only evidence which has previously been presented to the state regulatory commission in a proceeding seeking an increase in the same intrastate fares.

(2) Whether the district court, in setting aside the Commission's order directing an increase in intrastate fares, erred in also setting aside the Commission's order authorizing an increase in interstate fares.

STATEMENT

In February 1955 the Chicago, Milwaukee, St. Paul and Pacific Railroad (Milwaukee) filed with the Commission a petition under Section 13 (3) of the Act for an investigation to determine whether the Milwaukee's intrastate passenger fares within the Chicago suburban area, made or imposed under authority of the Illinois Commerce Commission, were causing unjust discrimination against interstate commerce, and to determine what fares, if any, should be established in order to remove any such discrimination found to exist. The petition alleged that in July 1952 the Milwaukee had applied to the Illinois Commission for authority to increase such fares, and that in November 1954 the state commission denied the relief sought. It was further alleged that the Milwaukee was thereby required to transport passengers within the Chicago suburban area at fares entailing an out-of-pocket loss of more than $700,000 per year, and that this caused unjust and unlawful discrimination against interstate commerce.

After a hearing in which the Milwaukee, the Illinois Commission, and an association of commuter passengers participated, the hearing examiner issued a proposed report which found that the existing fares caused unlawful discrimination, and proposed fare increases adequate to remove the discrimination. Upon consideration of exceptions to this report, the Commission issued its report on November 21, 1955.

The Commission found (1) that the Milwaukee's present suburban fares do not produce sufficient revenue to cover the out-of-pocket cost of the service,

and thus make no contribution toward its indirect costs or to a return on investment; (2) that the intrastate suburban fares cause and, unless increased to the extent prescribed, will continue to cause unjust discrimination against interstate commerce; (3) that such discrimination should be removed by establishing intrastate fares no lower than those prescribed in the appendix to its report; (4) that the prescribed fares will be just and reasonable, and will produce substantial additional revenue; and (5) that the Milwaukee's interstate suburban fares, on the basis of those prescribed for intrastate application, will be just and reasonable.

Coincident with the issuance of this report, the Commission entered an order authorizing the interstate rates which it had approved, i. e., those between Chicago and Walworth and Zenda, Wisconsin. This order did not require immediate establishment of the increased intrastate suburban fares, so as to allow a period of sixty days for approval of the increase by the Illinois Commission. This approval not having been given, the Commission by its order of March 2, 1956, directed the Milwaukee to establish the intrastate rates set forth in the Commission's report of November 21, 1955.

The state of Illinois, the Illinois Commission, and a commuter's association subsequently filed a complaint in the court below asking that the order increasing intrastate rates be set aside. The court rendered an opinion holding that the Commission had not made the findings requisite to a Section 13 (4) order, and that the evidence did not support the find-

ing that the prescribed intrastate rates were just and reasonable. In addition, the court, after observing that certain evidence as to the Milwaukee's out-of-pocket costs had been presented to the Interstate Commerce Commission but not to the Illinois Commission in the prior proceeding before that commission for authority to increase intrastate suburban fares, ruled that the Illinois Commission "should have been given a chance to fix fares on the same evidence and on the same basis" as the Interstate Commerce Commission.

The judgment of the district court remanded the cause to the Interstate Commerce Commission for further proceedings "not inconsistent with" the court's opinion. The judgment also set aside the order of the Commission authorizing an increase in the Milwaukee's interstate fares.

THE QUESTIONS ARE SUBSTANTIAL

1. The court below ruled that the Commission was not authorized to order an increase in intrastate rates pursuant to Section 13 (4) unless the applicant railroad had previously presented to the state agency having regulatory authority the "same evidence" as it presented to the Commission. We believe this ruling is directly contrary to the decision of this Court in *Florida* v. *United States*, 282 U. S. 194. In that case the Interstate Commerce Commission had entered an order under Section 13 (4) directing an increase in intrastate Florida rates which the Florida Railroad Commission had not prescribed but which had been maintained in intrastate commerce "subject to the authority of the

State" and "published as required by its laws". 282 U. S. 209. It was contended that Section 13 (4) did not empower the Commission to deal with these rates because they had not been "made or imposed by authority of any State".[1] In rejecting this contention, this Court said that the "fundamental purpose" of Congress was "to reach intrastate rates that were found to result in unjust discrimination against interstate commerce", and that the Commission's authority was not limited to rates which had been "affirmatively prescribed by the State." *Id.* at 210. The Court further said (*ibid.*):

> To hold, as some of the appellants urge, that there can be no adjustment of intrastate rates by the Interstate Commerce Commission so far as may be needed to protect interstate commerce until the State itself has first "sat in judgment on the issue of the lawfulness of those intrastate rates" would be to impose a limitation not required by the terms of the statute and repugnant to the grant of authority.

In *North Carolina* v. *United States*, 128 F. Supp. 718 (E. D. N. C.), affirmed, 350 U. S. 805, the railroads sought and obtained an order from the Interstate Commerce Commission increasing intrastate rates pursuant to Section 13 (4) without having first exhausted the remedies as to these rates given by state law. The court, in affirming the Section 13 (4) order, said that the contention that the Interstate Commerce Commission was without jurisdiction until

[1] Before acting under Section 13 (4), there must be an investigation under Section 13 (3), and Section 13 (3) is confined to rates "made or imposed" by State authority.

remedies under state law had been exhausted "is without merit". 128 F. Supp. 724. Accord: *Illinois* v. *United States*, 101 F. Supp. 36, 47 (N. D. Ill.), affirmed, 342 U. S. 930; rehearing denied, 343 U. S. 911.

Since the authority given by Section 13 (4) trenches upon state regulatory power, the courts should be careful to maintain the limits of the statutory authorization. But Section 13 (4) is also designed to promote an efficient national transportation system, by preventing state regulatory action which in effect or purpose places local interest above the national interest. We believe that it is wholly foreign to the basic purposes of the section to hold that the Commission's authority to act is contingent upon the fortuitous circumstances that the applicant railroad or railroads had, before invoking the authority of the Interstate Commerce Commission, presented to a state regulatory commission the same evidence as put before the Interstate Commerce Commission.

2. The opinion and judgment of the district court resulted from the filing of a joint complaint by the present appellees. The complaint stated that its purpose was to set aside an order of the Interstate Commerce Commission fixing "intrastate" rates for the Milwaukee's Chicago suburban passenger service. The validity of the Commission's order authorizing interstate rates for two Wisconsin points was outside the scope of the proceeding, nor did the court's opinion deal with the validity of the two interstate rates. We submit, therefore, that the court plainly erred in

entering a judgment which set aside the order authorizing an increase in these interstate rates.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial. It is respectfully submitted that probable jurisdiction should be noted.

J. LEE RANKIN,
Solicitor General.

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Assistant Attorney General.

CHARLES H. WESTON,
Attorney.

OCTOBER 1956.

APPENDIX

Section 13 of the Interstate Commerce Act, 49 U. S. C. 13, provides in part as follows:

> (3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.
>
> (4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation,

or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

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